

SEPARATE OPINION OF JUDGE GEVORGIAN

*France's first preliminary objection — Article 4 of the Palermo Convention — Sovereign equality includes immunities — Consequences of the Court's interpretation of Article 4 — Court's lack of jurisdiction *ratione materiae* — Article 35, paragraph 2, of the Palermo Convention is limited in nature — State consent — Risks of expanding the Court's jurisdiction — State parties must respect immunities when implementing the Palermo Convention.*

1. I have voted in favour of upholding France's first preliminary objection according to which the Court has no jurisdiction under the Palermo Convention. In this separate opinion I would like to clarify my position on certain elements of the reasoning supporting the Court's conclusion.

2. The dispute that was before the Court involved various issues that are defined in paragraphs 67-73 of the Judgment. My main concern relates to the consequences of the Court's interpretation of Article 4 of the Palermo Convention, which supports its conclusion on the lack of jurisdiction *ratione materiae* to deal with France's alleged violations of the immunities of States and State officials.

3. The latter provision reads as follows:

“1. States Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.

2. Nothing in this Convention entitles a State Party to undertake in the territory of another State the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other State by its domestic law.”

According to Equatorial Guinea, this provision has a general scope and must be interpreted in connection with the substantive provisions of the Palermo Convention. The reference to sovereign equality in paragraph 1 was intended to cover the protection of immunities; therefore, once it has been shown that France's acts were carried out in implementation of any of the substantive provisions of the Palermo Convention, the Court has jurisdiction *ratione materiae*. France challenges this interpretation and views Article 4 as a general “interpretative guideline” that does not incorporate any of the above-mentioned principles into the scope of the Convention.

4. The Court's jurisdiction under the Palermo Convention is based on Article 35, paragraph 2, which refers to "disputes concerning the interpretation and application" thereof. This provision, as any other compromissory clause, is limited to the substantive content of the treaty. As the Court affirmed in the second phase of the *South West Africa* cases, "jurisdictional clauses are adjectival not substantive in their nature and effect . . . Jurisdictional clauses do not determine whether parties have substantive rights, but only whether, if they have them, they can vindicate them by recourse to a tribunal."¹ In the present case, the central question is whether the jurisdictional clause enshrined in Article 35, paragraph 2, entitles Equatorial Guinea to invoke the immunities of States and State officials before the Court. According to the Judgment,

"the aspect of the dispute between the Parties relating to the asserted immunity of the Vice-President of Equatorial Guinea and the immunity claimed for the building at 42 Avenue Foch in Paris from measures of constraint as State property does not concern the interpretation or application of the Palermo Convention. Consequently, the Court lacks jurisdiction in relation to this aspect of the dispute."²

5. The Judgment bases this conclusion on the finding that "Article 4 does not incorporate the customary international rules relating to immunities of States and State officials"³. While it rightly asserts that immunities derive from the principle of sovereign equality enshrined in Article 4 of the Palermo Convention⁴, it explains that such a provision

"does not refer to the customary international rules, including State immunity, that derive from sovereign equality but to the principle of sovereign equality itself . . . In its ordinary meaning, Article 4 (1) does not impose, through its reference to sovereign equality, an obligation on States parties to act in a manner consistent with the many rules of international law which protect sovereignty in general, as well as all the qualifications to those rules."⁵

6. In light of this conclusion, the Judgment affirms that it becomes "unnecessary to make any further determinations regarding the scope or content of the obligations on States parties pursuant to Article 4 of the Palermo Convention"⁶.

¹ *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, Second Phase, Judgment, I.C.J. Report 1966, p. 39, paras. 64-65.

² Judgment, para. 102.

³ *Ibid.*

⁴ *Ibid.*, para. 93.

⁵ *Ibid.*, para. 93.

⁶ *Ibid.*, para. 119.

7. In my opinion, the reference to sovereign equality made in Article 4 of the Palermo Convention was intended to include the protection of immunities of States and State officials, but does not fall within the scope of the provisions covered by the compromissory clause. This is reflected in the present Judgment when recalling that “the rules of State immunity derive from the principle of sovereign equality of States”⁷.

8. However, it must be acknowledged that the scope of the compromissory clause is not as broad as the Applicant pretends. Given the broad nature of the principles of “sovereign equality, territorial integrity and non-intervention” mentioned in Article 4 of the Palermo Convention, incorporating all the customary rules encompassed by such principles may have the effect of undermining the principle of consent to the Court’s jurisdiction reflected in Article 35, paragraph 2, thereof.

9. In particular, applicants might invoke the Court’s jurisdiction *ratione materiae* by artificially linking a dispute concerning an incidental point of international law with the substantive provisions of the Palermo Convention. Accordingly, any dispute that is indirectly linked to any of the substantive provisions of the Palermo Convention would be a dispute “concerning” the latter. As a consequence, when the enforcement of one of its provisions is at stake, the Court would have jurisdiction over the many branches of international law that contain rules reflecting the principles of sovereign equality, territorial integrity and non-intervention. This would expand the Court’s jurisdiction to matters in respect of which the State parties did not give their consent under Article 35, paragraph 2.

10. The Court’s Judgment should not be read as in any way undermining the obligations concerning immunities that are binding on States parties to the Palermo Convention when they implement their obligations thereunder. This is reaffirmed in paragraph 102 of the Judgment, which states that the Court’s finding on jurisdiction “is without prejudice to the continued application of those rules”⁸. As the Court has found, there is a

“fundamental distinction between the existence and binding force of obligations arising under international law and the existence of a court or tribunal with jurisdiction to resolve disputes about compliance with those obligations. The fact that there is not such a court or tribunal does not mean that the obligations do not exist. They retain their validity and legal force.”⁹

⁷ Judgment, para. 93.

⁸ *Ibid.*, para. 102.

⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007 (I), p. 104, para. 148.

More specifically with respect to the question of immunities of State officials, the Court has determined that

“in international law it is firmly established that, as also diplomatic and consular agents, certain holders of high-ranking office in a State, *such as* the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal”¹⁰.

Compliance with such an obligation is independent of the Court’s lack of jurisdiction with respect to Article 4 of the Palermo Convention, and therefore remains of prime importance in the relations between States parties thereto.

(Signed) Kirill GEVORGIAN.

¹⁰ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, *Judgment*, *I.C.J. Reports 2002*, pp. 20-21, para. 51; emphasis added.